Supreme Court, U.S.
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No. 99-1158

In the Supreme Court of the United States

AMRIT LAL, PH. D.
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, STATE SYSTEM OF HIGHER EDUCATION, ET AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION, BLOOMSBURG UNIVERSITY, JAMES McCORMICK AND JESSICA KOZLOFF

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QUESTION PRESENTED

Did petitioner, who was opposing a motion for summary judgment in an employment discrimination case, carry his burden of showing the existence of a disputed issue of material fact?

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties. On one hand, it does not include all those who were parties to the proceeding in the Court of Appeals; on the other hand, it improperly includes persons who were not parties to that proceeding. *Cf.* Sup. Ct. Rule 12.6.

The only parties to the proceedings in the Court of Appeals were the petitioner himself, the Pennsylvania State System of Higher Education and Bloomsburg University. Both the State System and Bloomsburg University should therefore have been named as respondents in this Court, but the petition incorrectly omits Bloomsburg University.

The petition also names as respondents several individuals: James McCormick, the Chancellor of the State System; Jessica Kozloff, the President of Bloomsburg University; and Professor James Percey. These individuals were named as defendants in petitioner's complaint, Pet. App. 11,[1] but the petitioner voluntarily dismissed his claims against them in the District Court, and proceeded only against the State System and Bloomsburg University. Pet. App. 12, 22-23. The individual defendants were thus not parties to the proceeding in the Court of Appeals, and the petition incorrectly names them as respondents in this Court.

Professor Percey has been separately represented throughout the case. This brief is filed on behalf of all the other actual and putative respondents, whether named or not.

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[1]The appendix to the petition is unfortunately not paginated. The eleventh page is the first page of the District Court's opinion, labeled "Appendix B."

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STATEMENT OF JURISDICTION

The Pennsylvania State System of Higher Education and Bloomsburg University are agencies of the Commonwealth of Pennsylvania. Pa. Stat. Ann., tit. 24, § 20-2002-A (Purdon 1992). Insofar as the petitioner's claims against them arise under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, they are barred by the Eleventh Amendment to the Constitution. *See Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 466-67 (1945) (Eleventh Amendment immunity may be asserted for the first time on appeal).

STATEMENT OF THE CASE

This is an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Age Discrimination in Employment Act, 29 U.S.C. § 629 *et seq.*; and the Pennsylvania Human Relations Act, Pa. Stat. Ann., tit. 42, § 951 *et seq.* (Purdon 1991 & 1999 Supp.). Petitioner was a professor at a state university, who claims that he was denied tenure because of his age and national origin. Pet. App. 4.

1. Bloomsburg University is one of the fourteen institutions owned and operated by the Commonwealth of Pennsylvania through its State System of Higher Education. *See* Pa. Stat. Ann., tit. 24, § 20-2002-A (Purdon 1992). Petitioner was employed at the University as an associate professor in its political science department. In May of 1994, the then president of the University denied petitioner's application for tenure.

Petitioner was then sixty-two years old, and is a native of India. Pet. App. 13; C.A. App. 62, 79 (admission by petitioner).[2]

Tenure decisions at the State System's universities are governed by detailed procedures and criteria contained in the collective bargaining agreement between the State System and its professors' union. C.A. App. 63, 79 (admission by petitioner). Applicants for tenure are evaluated by a series of committees and individuals, culminating in a review by the president of the university, for effective teaching and fulfillment of professional responsibilities, continuing scholarly growth, and service to the university or community. Pet. App. 14; C.A. App. 96 (collective bargaining agreement).

Accordingly, petitioner submitted his tenure application to the tenure committee of the political science department. Pet. App. 5. Petitioner's application included selected peer evaluation reports from other faculty members who had observed him, selected student evaluations and other materials. Pet. App. 13; C.A. App. 65, 79 (admission by petitioner). The departmental tenure committee, by a majority vote, recommended against tenure on the ground that petitioner had not demonstrated his effectiveness as a teacher. Pet. App. 14.

The departmental committee forwarded its recommendation to the University Tenure Committee. Although petitioner (without citing any support in the record) calls this Committee a "rubber stamp," Pet. 3, the University Tenure Committee considered not only the petitioner's application materials and the recommendation of the departmental

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[2]The designation "C.A. App." refers to the appendix filed in the Court of Appeals.

committee, but also the recommendation of petitioner's department chair — who recommended against tenure, Pet. App. 5 — and conducted its own meeting with petitioner. Pet. App. 14; C.A. App. 64, 67, 79, 84 (admissions by petitioner). The University Tenure Committee likewise recommended against granting tenure to petitioner, finding that his teaching effectiveness was inadequate, and that his scholarly growth and university/community service were insufficient. Pet. App. 14.

The final decision on tenure was made by the then President of the University, Curtis English. Pet. App. 6, 15. Dr. English reviewed the petitioner's application, student and peer evaluations, curriculum vitae, and other materials, as well as the recommendations of the departmental tenure committee, the department chair, and the University Tenure Committee. Pet. App. 6-7, 15. He was not, however, bound by any of these recommendations. Pet. App. 6, 15. Petitioner now asserts (again without citing support in the record) that Dr. English "accepted the University-Wide Committee recommendation ... without making an independent judgment of his own." Pet. 5. In the District Court, however, petitioner expressly admitted that "[t]he President's review is a separate and independent review," and that "[a]fter a thorough review of Dr. Lal's record, Dr. English decided not to grant tenure to Dr. Lal." C.A. App. 70, 86 (admission by petitioner); *see* Pet. App. 6-7, 15.

Dr. English found that petitioner had not demonstrated either his effectiveness as a teacher or his commitment to scholarly growth. Pet. App. 5, 17; C.A. App. 323-25 (English declaration). In the area of effective teaching, petitioner's student evaluations were quite low compared to other faculty; for example, in each of two courses, about thirty per cent of his students rated his effectiveness as "below average" or "one of the worst." C.A. App. 135, 137 (tenure application). Similarly, the

classroom observations of his peers were, at best, lukewarm. C.A. 138 ("need for better organization and communication"), 250 ("little enthusiasm," "little attempt to involve the students"). As to scholarly growth, petitioner submitted virtually no evidence of scholarly activity in the past few decades: no published articles, books or papers since the 1960's; no presentations, or even attendance, at professional conferences; and no editorships of learned publications. Pet. App. 5; C.A. App. 107-11 (tenure application).

While petitioner contested the factual basis for Dr. English's conclusions, he expressly admitted that Dr. English's "decision to deny tenure to Lal was based on his conclusion that Lal did not demonstrate that he was committed to quality teaching or motivating students to learn." Pet. App. 15; C.A. App. 86 (admission by petitioner).

2. Petitioner brought this action against the State System of Higher Education and Bloomsburg University, as well as three individuals: James McCormick, the Chancellor of the State System; Jessica Kozloff, Dr. English's successor as the President of Bloomsburg University; and James Percey, a professor of political science who served on the departmental committee which reviewed petitioner's tenure application. After discovery, all of the defendants moved for summary judgment, and in response petitioner voluntarily withdrew his claims against the three individual defendants. Pet. App. 22-23.

The District Court then granted summary judgment to the State System and Bloomsburg University, the remaining defendants. Pet. App. 11-19. The District Court began by reciting the well-established standards governing summary judgment, Pet. App. 12-13, and then applied the familiar burden-shifting formula of *McDonnell Douglass Corp. v. Green*, 411 U.S. 792

(1973) and its progeny. Pet. App. 16. In the District Court's view, petitioner had not even established a prima facie case of discrimination. Pet. App. 16-17. But in any case, the District Court held, the defendants had offered legitimate non-discriminatory reasons for their action, and petitioner had not produced evidence from which a reasonable fact-finder could conclude that those reasons were pretextual. Pet. App. 17-19.

The District Court noted that petitioner had vigorously attacked the recommendations of the departmental tenure committee and the department chair, contending that their conclusions were unsubstantiated and unfair. Pet. App. 18. The District Court pointed out, however, that it was not enough for petitioner to show that their conclusions were wrong or mistaken; rather, he had to show such "implausibilities, inconsistencies, incoherencies or contradictions" as would support an inference that the asserted reason for their recommendation was not the real reason at all. Pet. App. 17, *quoting Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). This petitioner had failed to do. Pet. App. 18.

More importantly, petitioner failed even to allege that the *final* decision on his tenure was pretextual. The District Court pointed out that the recommendations of the departmental tenure committee and the department chair

> were only part of the overall review of Lal's application. The President of the University, Curtis English, had the final decision as to any tenure application and was not bound by the prior recommendations of [the departmental committee and chair]. Lal does not allege that the decision of English to deny his application was motivated by discrimination.

Pet. App. 19. Accordingly, petitioner's assertions about the departmental tenure committee and department chair, even if accepted, would not undermine the credibility of the reasons given for the *final* decision on his tenure application. *Ibid.*

3. The Court of Appeals affirmed the District Court's decision, and adopted much of its reasoning. The Court of Appeals expressed some doubt about the correctness of the District Court's holding that petitioner had failed to establish a prima facie case of discrimination. Pet. App. 4. The Court of Appeals found it unnecessary to reach that issue, however, because they agreed that petitioner "could not demonstrate that the non-discriminatory reasons offered by Bloomsburg University for the denial of tenure were pretextual." *Ibid.*

As he had in the District Court, petitioner "only attempt[ed] to show that the conclusions of [the departmental tenure committee and department chair] was [sic] mistaken in certain respects." Pet. App. 6. He again ignored the fact that the final decision on tenure was made by President English, who independently reviewed these recommendations as well as other materials. Pet. App. 7. Petitioner

> has not shown that *English's* review of his application for tenure and his conclusion that it should be denied were implausible or inconsistent. We agree with the District Court's conclusion that Lal's assertions about the inaccuracies of [the departmental tenure committee and chair's] review of his application for tenure would not enable a reasonable factfinder rationally to find that the *University's* proffered reasons for denying tenure were pretextual and unworthy of credence.

Ibid (emphases added).

The Court of Appeals denied petitioner's requests for rehearing or rehearing en banc, and this petition followed.

REASONS FOR DENYING THE WRIT

In addition to the facts that petitioner's age discrimination claim is barred by the Eleventh Amendment, *supra* at 1, and that he has named as respondents persons against whom he voluntarily dismissed his claims in the District Court, *supra* at ii, there are substantive reasons why the Court should not review this case.

I. The Court of Appeals Correctly Decided this Case by Applying Well-Established Principles to the Facts of this Case.

As the above discussion demonstrates, this case presents no novel issues. The courts below relied upon well-settled principles governing the resolution of summary judgment motions, *see* Pet. App. 12-13, *citing* Fed. R. Civ. Proc. 56, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and upon equally well-settled principles governing claims of employment discrimination. *See* Pet. App. 15, *citing McDonnell Douglas Corp. v. Green, supra* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Petitioner's discontent is not so much with the standards applied by the lower courts to his claims, as with the outcome.

Petitioner simply disagrees with the conclusion, by both courts below, that the record in this case shows no disputed issue of material fact. "In the case at bar there is a genuine issue of

material fact that should be left to the jury." Pet. 14; *see, e.g.*, Pet. 10-11 (rehearsing evidence allegedly "overlooked" by the Court of Appeals). Disagreement over the application of established principles to the facts of a specific case does not, however, merit the Court's discretionary review.

II. There Is No Conflict among the Lower Courts on the Issue Actually Presented and Decided in this Case.

To escape the fact-bound nature of his case, petitioner tries to shoehorn it into what he sees as a conflict among the Courts of Appeals. The asserted "conflict," however, is illusory; and in any case involves an issue which is not presented by this case.

As petitioner sees it, the Courts of Appeals are divided over the proper way to resolve claims of employment discrimination in light of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). *Hicks* dealt with the inferences which a factfinder may draw when it rejects, as pretextual, an employer's proffered reasons for its actions. The Court held that the employee continues to bear the burden of proving, not pretext, but discrimination; and that a finding of pretext may permit, but does not compel, an inference of discrimination:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and ... upon such rejection, no

> additional proof of discrimination is required. But ... rejection of the defendant's proffered reasons [does not] *compel[]* judgment for the plaintiff.

Id., at 511 (footnotes and internal quotation marks omitted; emphases added). Petitioner, relying mainly on secondary authorities, claims that in the aftermath of *Hicks*, some circuits permit an inference of discrimination from a showing of pretext alone, while others require what he calls "pretext-plus," that is, "some direct or circumstantial evidence in addition to the plaintiff's evidence of pretext." Pet. 7.

Petitioner misreads the cases upon which he relies. In every case which he cites as establishing a "pretext-plus" rule, *see* Pet. 9, the court recognized that, depending upon circumstances, proof of pretext alone could be sufficient to support an inference of discrimination. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996)(en banc)("[T]he evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence")[3]; *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994)("[E]vidence that an employer's proffered nondiscriminatory explanation is wholly without merit ... might ... permit[] an inference that age discrimination was a motivating factor in a plaintiff's termination"); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 n.3 (1st Cir. 1994)("[S]ome cases exist where a prima facie case and the disbelief of a pretext could provide a strong enough inference of actual discrimination to permit the fact-finder to find

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[3]The petition cites to the panel decision in *Rhodes*, 39 F.3d 537 (5th Cir. 1994), without noting that the Fifth Circuit reheard the case en banc.

for the plaintiff"); *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir. 1997)("[A] finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an ultimate finding of intentional discrimination"). The circuit conflict which petitioner posits simply does not exist.

More important, the issues which were actually presented and decided in petitioner's case have nothing to do with this asserted conflict. Petitioner claims that the circuits are in conflict over the inferences which permissibly may be drawn from a finding of pretext. He ignores the fact that, in his case, there *was* no finding of pretext. Both of the courts below found that the employer had offered legitimate non-discriminatory reasons for its action, and that petitioner had offered no evidence from which a reasonable fact-finder could find that those reasons were pretextual. Pet. App. 7, 19. Whether such a finding would or would not have been sufficient to support an inference of discrimination is an issue which those courts, quite properly, neither considered nor decided.

For the same reason, petitioner's case has little in common with *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (cert. granted November 8, 1999). In *Reeves*, the Court granted certiorari on the question, among others, of whether an age discrimination claim requires direct evidence of discriminatory intent. But in this case, the courts below did not require petitioner to produce such evidence; rather, they held that he had failed to produce *any* evidence, direct or indirect, to demonstrate a disputed issue of material fact on the issue of discrimination. *Reeves*, whatever its outcome, thus will have no effect on this case, and there is no need to hold this case to await its resolution.

CONCLUSION

The Court should deny the petition.

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